



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 99 210 51611 Office: CALIFORNIA SERVICE CENTER

Date: AUG 16 2000

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

Public Copy
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrence M. O'Reilly

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a company engaged in international importing and exporting. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that a qualifying relationship exists between the petitioner and the claimed parent company. The director also determined that the beneficiary had not been employed abroad in a managerial or executive capacity.

On appeal, counsel argues that the director erroneously denied the petition.

It is noted that the issue raised by the director regarding the beneficiary's employment abroad is not an issue for consideration in a petition for extension of previously approved employment and should have been discussed in connection with the adjudication of the original petition. Therefore, this issue will not be addressed in this proceeding.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the

beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was incorporated in 1996 and states that it is the parent company of [REDACTED] located in Seoul, Korea. The petitioner claims three employees and an estimated gross annual income of \$316,373.00. The petitioner seeks to employ the beneficiary for two years at a salary of \$500.00 per week.

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is

not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition, the petitioner described the beneficiary's proposed duties as "a chief executive officer, oversees entire sales activities in U.S. and operates the corporation."

On August 6, 1999, the petitioner was requested to submit the organizational charts for the foreign and U.S. entities and the number and names of the employees supervised by the beneficiary, as well as their titles, position descriptions, and degrees possessed.

In response, the petitioner submitted an organizational chart for the foreign entity which listed a president, a vice president, two managers, (one the beneficiary), and a supervisor. Also submitted was an organizational chart for the U.S. entity which listed the beneficiary as president, a vice president and one staff employee. The petitioner did not submit the requested position descriptions or the duties performed of the various employees of either entity.

In her decision, the director determined that the petitioner failed to establish that the beneficiary would be managing a function, department, subdivision, or component of the petitioning company. The director also found that the beneficiary would not be functioning at a senior level within an organizational hierarchy. Finally, the director found that the beneficiary would not be managing a subordinate staff of professional, managerial, or supervisory personnel that would relieve the beneficiary from performing non-qualifying duties. The director therefore concluded that the petitioner failed to demonstrate that the beneficiary

would be employed in a managerial or executive capacity.

On appeal, counsel argues that the "CSC in essence readjudicated the underlying petition rather than acting on the application to extend Cho's stay." Counsel then quotes 8 C.F.R. 214.2(1)(9)(iii)(A) and asserts that in the instant case the director "ignored both the Code and the Operating Instructions in that Georinone received neither a 'notice of intent to deny' nor a 'motion to reopen or reconsider' prior to the petition being readjudicated on eligibility grounds."

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. For this reason, the petition may not be approved.

The second issue in this proceeding is whether a qualifying relationship exists between the U.S. and the foreign organizations.

8 C.F.R. 214.2(1)(1)(ii)(G) states:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(1)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(1)(1)(ii)(J) states:

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(1)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(1)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the current petition, the petitioner submitted insufficient evidence to establish a qualifying relationship between the foreign and U.S. entities. Therefore, on August 6, 1999, the director requested additional evidence regarding the ownership and control of the petitioning company. The requested evidence was to include wire transfer notices and cancelled checks for the stock purchases as well as all stock certificates.

In response, the petitioner submitted stock certificate number one which indicated that [REDACTED] owned 1,600 of the authorized 100,00 shares of [REDACTED], and copies of Advice of Credit/Incoming Wires from [REDACTED]. As noted by the director, however, the wires do not indicate that the funds originated from the foreign entity, nor do they list the petitioner as the beneficiary of the funds.

On appeal, counsel fails to address the director's concerns other than to state that a notice of intent to deny should have been issued to the petitioner. No additional evidence that a qualifying relationship exists between the U.S. and foreign entities has been submitted.

Regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for

purposes of this nonimmigrant visa petition. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Matter of Church of Scientology International, id.

As general evidence in a non-immigrant petition for an intracompany transferee, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See Matter of Siemens Medical Systems, Inc., supra. Without full disclosure of all relevant documents, the Service is unable to determine the elements of ownership and control.

Furthermore, a certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). The regulation at 8 C.F.R. 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

For immigration purposes, the issuance of a piece of paper titled "stock certificate" is not conclusive as to whether a qualifying relationship exists between a petitioner and a foreign parent company. Otherwise, the intent of Congress could be circumvented by the issuance of stock certificates to a foreign company that has no knowledge of the purported corporate relationship or to a strawman or company that exists on paper only. Cf. Matter of Rhee, 16 I&N Dec. 607, 610 (BIA 1978) (stating that the issuance of a

"certificate of ordination" is not conclusive as to who qualifies as a minister for immigration purposes).

Upon review, the petitioner has not established that the foreign parent company has purchased an ownership interest in the petitioning company. For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.